AHMAD RASHIDI ZAINOL & ANOR A

v.

PP

HIGH COURT MALAYA, PULAU PINANG B
ZAMANI A RAHIM J
[CRIMINAL APPEAL NO: 42S-62-10-2012]
30 APRIL 2013

CRIMINAL LAW: *Penal Code - Section 395 - Gang robbery - Accused persons snatched gold necklace worn by 76 year old lady - Accused persons found guilty, convicted and each sentenced to five years' imprisonment and three strokes of whipping - Whether sentence adequate and proportionate with crime committed* C

CRIMINAL PROCEDURE: *Appeal - Decision of trial judge - Accused persons charged with gang robbery - Accused persons each sentenced to five years' imprisonment and three strokes of whipping - Maximum punishment for offence - Whether sentence adequate and proportionate with offence committed - Penal Code, s. 395* D

CRIMINAL PROCEDURE: *Trial - Defence - Alibi - Whether a recent invention and an afterthought - Whether accused persons found guilty and convicted* E

The first and second accused persons were charged with gang robbery, an offence under s. 395 of the Penal Code. The victim ('SP3'), a 76 year old lady, upon hearing a knock, had opened the house door to find the first accused standing before her. The first accused immediately entered into the house, pressed SP3's head and snatched a gold necklace she was wearing. The first accused then fled the scene on a waiting motorcycle ridden by the second accused but both were successfully apprehended by the police. Unfortunately, the said gold necklace could not be retrieved as it had been melted at a jewellery shop. Satisfied that the prosecution had succeeded in establishing a *prima facie* case under s. 395 of the Penal Code, both the accused persons were called to enter their defence. Both the accused persons' defence was that of an alibi. However, the trial judge found the said defence of alibi was a recent invention and an afterthought. At the end of the trial, both the accused persons were found guilty and convicted as charged and were each sentenced to five years' imprisonment and three strokes of whipping. Hence, the present appeal. F G H I

Held (dismissing appeal; setting aside sentence of court below and substituting it with 12 years' imprisonment and ten strokes of whipping on each accused person):

(1) The defence failed to cast any reasonable doubt on the truth of the prosecution case. As such, the prosecution had proved its case beyond reasonable doubt. The finding of guilty and conviction of both the accused persons by the trial judge was certainly not erroneous. (para 20)

(2) The offence of gang robbery under s. 395 of the Penal Code is a serious and grave offence. Even though both the accused persons were not armed at the time of committing the gang robbery, SP3 was traumatised by what had happened. After the incident, SP3 was afraid to stay alone in her own house and would always require a companion, causing inconvenience to herself and her family members. In addition to that, SP3 had also suffered financial losses because the gold necklace was beyond recovery as it had been melted. Having regard to the facts and circumstances of the case, the sentence of five years' jail and three strokes of whipping imposed by the trial judge was manifestly insufficient. The sentence passed was not consistent and did not accord with the danger and cruelty of the *modus operandi* of grabbing and snatching committed on a 76 year old lady. (paras 23, 24 & 30)

(3) The maximum punishment under s. 395 of the Penal Code was 20 years' imprisonment. If both the accused persons pleaded guilty to the charge, the maximum punishment imposable on them would not be more than ten years. However, both the accused persons did not plead guilty to the charge. They claimed to be tried and it is axiomatic that this was not a plea bargaining case. It is logical that upon being found guilty and convicted after a full trial, the sentence should be more than ten years. The sentence of five years' imprisonment and three strokes imposed by the trial judge was grossly inadequate and was set aside. The court thereby substituted it with 12 years' imprisonment and ten strokes of whipping on each accused person. (paras 32, 33 & 34)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA ***(refd)***
Ku Lip See v. PP [1981] 1 LNS 209 FC ***(refd)***
Lee Chow Meng v. PP [1975] 1 LNS 199 ***(refd)***
Lim Kim Poh v. PP [2000] 8 CLJ 328 HC ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Muhammad Ridoan & Anor v. PP [2013] 5 CLJ 904 HC ***(refd)***
Muhammad Safriadi lwn. PP [2011] 1 LNS 686 HC ***(refd)***
PP v. Timothy Bilong & Anor [2009] 1 LNS 1738 HC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Yong Pak Yong v. PP [1959] 1 LNS 102 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 172D(1)(c)(ii), (3)(a)(b)(i)(ii), (iii), (iv), (v), (4), 183A, 402A
Penal Code, ss. 394, 395, 397

For the appellants - RSN Rayer; M/s R Nethaji Rayer & Co
For the respondent - Lim Cheah Yit; DPP

Reported by Najib Tamby

JUDGMENT

Zamani A Rahim J:

[1] Ahmad Rashidi bin Zainol and Mohd Farhan bin Mohamed Kasim (hereinafter referred to as the "first and second accused") respectively were charged with an offence of gang-robbery under s. 395 of the Penal Code. The charge reads as follows:

> **The Charge**
>
> Bahawa kamu bersama-sama pada 24 Februari 2010 jam lebih kurang 9.30 pagi, di rumah No. 16C Lebuh Buckingham di dalam Negeri Pulau Pinang telah melakukan rompak berkumpulan ke atas rantai leher emas milik seorang perempuan bernama Ameenal Amal KP: 330223-71-5292. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 395 Kanun Keseksaan.

[2] The victim was a 76 years old lady, SP3. According to her, the gang-robbery incident happened in the morning. When SP3 was at home, she heard someone knocked the door of her house. She opened it. Immediately the first accused entered the house

and pressed her head. The first accused spoke to her in Tamil which SP3 could not understand. The first accused snatched a gold necklace worn by SP3 and ran away. SP3 gave chase and at the same time shouted "curi, curi". The first accused escaped on a waiting motorcycle, PJA 5887. The first accused was riding pillion, whilst the second accused was the rider.

[3] The testimony of SP3 was supported by SP4, a policeman who was in the vicinity of the crime scene at that time. SP4 heard the shout by SP3. SP4 gave chase on his motorcycle from the rear. On nearing the accused's motorcycle, SP4 saw the first accused was holding a gold necklace in his right hand and shoved it into his trousers' pocket.

[4] When the motorcycle stopped at Lebuh Bishop, SP4 approached both the accused and identified himself as a policeman. Both the accused took to their heels. SP4 chased after the second accused who had scaled a zinc wall at the rear of Wisma Kastam and jumped over it. SP4 lost sight of him. SP4 returned to the place where both the accused started to disperse and ran away. SP4 seized the motorcycle, PJA 5887.

[5] The first and second accused were subsequently apprehended by SP8, after several attempts before this was unsuccessful.

[6] On being questioned, the first and second accused led SP9 to a jewellery shop where they sold off SP3's gold necklace. The said gold necklace could not be retrieved as the proprietor of the shop, SP10 said it had been melted.

[7] The first and second accused were identified by SP3 and SP4 in the dock during the trial and also in the identification parade held by the police. Learned counsel had challenged the identification evidence of SP3 but SP3 replied that she did not suffer an eyesight impairment at the time of the incident. She only developed not too serious an eyesight impairment after the robbery. She had since recovered after she had undergone a surgery before the trial of this case.

[8] The presiding judge had found that SP3's evidence relating to the identity of the first accused was inspiring, positive and reliable. Having regard to SP3's demeanour, despite her age, the

presiding judge found SP3 to be a firm and steadfast in her identification of the first accused. This is how the presiding judge put it:

> Dalam pada itu, Mahkamah bersetuju dengan penghujahan Timbalan Pendakwaraya bahawa SP3 begitu yakin dengan pengecamannya. Walaupun beliau seorang perempuan tua berumur 76 tahun, Mahkamah mengambil kira demeanornya yang begitu yakin dan tidak langsung menunjukkan elemen keraguan atau teragak-agak semasa pengecamannya.
>
> Pengecaman positif semasa kawad cam juga menunjukkan keterangan SP3 adalah jitu dan kukuh.
>
> [at p. 15 Alasan Penghakiman]

[9] The reliability and cogency of SP3's evidence on the first accused identity as being the robber was stated by the presiding judge in the following words:

> SP3 dapat mengecam OKT 1 dengan tepat dan yakin sebagai peragut rantainya. Manakala SP4 pula dapat mengecam OKT1 dan OKT2.
>
> [at p. 22 Alasan Penghakiman]

[10] Learned counsel also took exception that the robber spoke to SP3 in Tamil, whilst the first accused could not speak Tamil. On this point, the presiding judge said that the identification of the accused did not depend on the language spoken but on the facial appearance of the accused. The presiding judge wrote as follows:

> Mangsa tidak faham bahasa yang dipertuturkan. Jadi pengecaman bukanlah melalui bahasa tetapi beliau melihat sendiri wajah OKT.
>
> [at p. 15 Alasan Penghakiman]

[11] In her judgment, the presiding judge found that the prosecution witnesses were credible, guided by the three tests to determine credibility as propounded by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457 at p. 477. The prosecution witnesses did not have any "malice intention" or oblique motive against both the accused.

[12] The presiding judge too said that, despite proving the first and second accused had committed robbery, the prosecution was also required to prove *the accused had caused hurt to the victim.*

(see at p. 21 of alasan penghakiman). This statement in italic is erroneous. At any rate, the prosecution did not appear to call or produce any evidence to prove the injuries suffered by the victim ie, SP3. Voluntarily causes hurt in committing robbery is not an ingredient for an offence of gang-robbery under s. 395 under which the first and second accused were charged. It is an essential ingredient of an offence under s. 394 of the Penal Code, though both offences carry the same punishment which may extend to 20 years.

[13] Be that as it may, at the close of the prosecution's case, after having called 11 witnesses, the presiding judge concluded that the prosecution had succeeded in establishing a *prima facie* case of gang-robbery under s. 395 of the Penal Code. The defence of both the accused were called.

[14] The first and second accused gave evidence on oath. According to the first accused, he went to sea fishing the night before the incident and came back on the morning of the incident. He then slept. Whereas according to the second accused, while he was working in a roti canai stall, he suffered diarrhea and his employer, who is his brother in law, gave him a day-off. He rested in his house.

[15] This line of defence was totally different and radically changed from the defence advanced during the prosecution case. During the prosecution stage, it was suggested to SP3 that the accused were merely innocent bystander happened to be at the scene of crime at the wrong time. The accused claimed that they were mistakenly identified as the robbers by SP3. Whilst during the defence case, both the accused said that they were not at the crime scene. Having considered the defence, it was an alibi defence. As no alibi notice under s. 402A of Criminal Procedure Code was given, their evidence should be excluded: see *Ku Lip See v. PP* [1981] 1 LNS 209; [1982] 1 MLJ 194 at p. 196 and *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166; [1988] 3 MLJ 412. On this issue, the presiding judge remarked as follows:

> OKT 1 dan OKT 2 diwakili oleh peguam yang terpelajar di peringkat kes pendakwaan dan pembelaan. Tiada Notis Alibi di bawah Seksyen 402A Kanun Prosedur Jenayah diberikan oleh kedua-dua mereka.
>
> [at p. 25 Alasan Penghakiman]

[16] The trial judge went on to say as follows:

> Mahkamah tidak mempertimbangkan pembelaan alibi yang dipertimbangkan melalui saksi SD4 iaitu abang ipar OKT 2 yang menyatakan OKT 2 sakit, bekerja dan disuruh pulang. Ini adalah kerana ketiadaan Notis Alibi.
>
> Isu ini kalau benar dan diutarakan pada awal, penyiasatan mengenai perkara ini tentu akan dilakukan oleh pihak polis. Namun, apabila isu ini hanya ditimbulkan pada peringkat pembelaan, Mahkamah memutuskan bahawa ini adalah 'afterthought' evidence.
>
> [at p. 26 Alasan Penghakiman]

[17] Thus the first and second accuseds' defence of alibi is a recent invention and an afterthought: see *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154.

[18] The defence case was riddled with doubts. The first accused said his motorcycle, PJA 5887 was borrowed by his friend named Fahmi bin Murad on the material date, giving the impression that he could not be riding as pillion on the day of the incident as the motorcycle was not in his possession. But the first accused has taken a perilous course by not putting the character of Fahmi bin Murad to the appropriate prosecution witnesses during the prosecution case. It would appear that the presiding judge was not hoodwinked by the first accused stance. This is how the presiding judge wrote:

> Tiba-tiba semasa pembelaan OKT telah mewujudkan satu karakter bernama Fahmi bin Murad yang telah meminjam motorsikalnya. Perkara ini tidak pernah dinyatakan sebelum ini. Tiada Laporan Polis dibuat mengenainya serta tidak tahu mengenai karakter ini yang OKT1 memberi pinjam motorsikal kepadanya.
>
> Kalau sebenarnya wujud seseorang yang bernama Fahmi, maka semestinya pihak pembela telah meletakkan soalan kepada SP4 untuk mencabar pengecaman OKT1 dan OKT2.
>
> [at p. 23 Alasan Penghakiman]

[19] The presiding judge too found the evidence of SD3 and SD4 to be doubtful. Their evidence were merely sought to shore up the defence case.

[20] Having scrutinised the defence case in the light of the prosecution case, I am in absolute agreement with the presiding judge that the defence has failed to cast any reasonable doubt on the truth of the prosecution case. As such the prosecution has proved its case beyond reasonable doubt. The finding of guilty and conviction of both the accused by the presiding judge is certainly not erroneous.

[21] Now I come to sentence.

[22] At the end of the entire trial, the first and second accused were found guilty and convicted as charged. Upon mitigation and taking into account the sentencing principles, the presiding judge sentenced each of the accused to five years imprisonment and three strokes of whipping. In passing the sentence, the presiding judge reasoned as follows:

> Kesalahan yang dilakukan oleh OKT1 dan OKT2 adalah satu kesalahan yang serius. Cara jenayah ragut yang dilakukan juga adalah begitu merbahaya terhadap perempuan tua yang berusia 76 tahun sewaktu kejadian.
>
> Justeru itu, satu hukuman yang berat perlu dijatuhkan terhadap OKT1 dan OKT2. Dalam pada itu, jenayah sebegini semakin meningkat serta membawa kecederaan parah dan maut kepada mangsa.
>
> Mahkamah mestilah memandang berat atas jenayah sebegini. Mahkamah berharap sabitan dan hukuman yang dijatuhkan adalah wajar dan berpatutan.

[23] I am entirely in agreement with the presiding judge that the offence of gang-robbery under s. 395 of the Penal Code is a serious and grave offence. The crime of this nature is on the increase and rampant which resulted in grievous injuries and sometimes lead to death of the victim. As an example, please see Lampiran X annexed to this judgment. In the instant case, according to the presiding judge the *modus operandi* of grabbed and snatched committed on an old lady of 76 years of age was dangerous and cruel.

[24] Again I agree that the court of law must view this type of crime seriously. Unfortunately the presiding judge was of the view that the sentence of five years imprisonment and three strokes was

sufficient and reasonable. The presiding judge merely paid a lip service by saying the crime committed was serious and rampant. Having regard to the facts and circumstances of this case, I find the sentence of five years jail and whipping of three strokes imposed by the presiding judge is manifestly insufficient. The sentence passed was not consistent and did not accord with what was expressed by the presiding judge alluded above. Despite there is lack of the cross appeal by the prosecution, I am reminded of the words of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Kesavan Baskaran v. PP* [2008] 6 CLJ 390 as follows:

> [11] Next, there is the absence of the cross appeal by the public prosecutor. Now it is true; and it has been said often enough; that the public prosecutor is the guardian of the public interest. But so too are the courts. For they are the last bastion of the victimized and the oppressed. If the judiciary is to adopt a lenient tap on the wrist attitude as constituting sufficient punishment for a grave and serious crime merely because the public prosecutor has not filed a cross appeal, the public will lose all faith in the justice system, particularly the courts. It is therefore of the utmost importance for a sentencing court to ensure that the sentence passed in cases involving a crime of a serious or brutal nature truly reflects the gravity of the offence.

[25] In my earlier decision in *PP v. Aswadi Sobni and Kasdiadi*, Penang Criminal Appeal No. 42H-33-05/2012 it was also a case of gang-robbery armed with a knife, an offence under s. 395 read with s. 397 of the Penal Code, I have had occasion to dwell on the punishment of this type of crime in the following words:

> The first and utmost consideration of punishment must be given to the issue of public interest. After all, the law is enacted to protect the public or society. The court too must not shut its ears to the public outcry or abhorrence of the rampancy crime of snatch thefts and armed robberies committed in the street under broad day light. I take judicial notice of what is common knowledge and notorious on the rampancy of robbery cases and sometimes violence inflicted on the victims are grievous in nature which in some cases led to their death. I cannot help to notice, when I flip through my morning newspapers or switch on the television news, the stories about the injuries sustained by the victims of snatch thefts, or armed robberies, who are normally

A ladies are quite common. Sometimes death of the victims do occur. Annexed as LAMPIRAN A to this judgment are some of the recent snatch theft or robbery cases which I have download from the internet. It may not be evidence in the case when the culprits are being prosecuted for the offence but it is an example of what is common knowledge: see Good J in *Yong Pak Yong v. PP* [1959] 1 LNS 102; [1959] MLJ 176 at p. 177 and His Lordship Abdul Hamid J in *Lee Chow Meng v. PP* [1975] 1 LNS 199; [1976] 1 MLJ 287.

[26] Immediately after the above passage, I went on to cite three C cases relating to the sentences for similar offence to determine the trend of sentencing. It is as follows:

At the time of completing this judgment, I have come across in The Star newspaper, Tuesday 4 December 2012 a popular Malaysian singer in the person of Mizz Nina was a victim of a D smash-and-grab robbery while she was in her car at a junction in Ampang Jaya: see LAMPIRAN B.

[27] Now, I propose to look at sentences in other cases for similar offence to determine the trend of sentencing policy. Below E are three past decided cases of armed gang robbery under s. 395 read with s. 397 of the Penal Code.

(a) The most recent case of *Muhammad Safriadi lwn. PP* [2011] 1 LNS 686; [2011] MLJU 1405 where the accused pleaded F guilty to a charge of armed gang robbery using a parang. The Sessions Court at Johor Bahru convicted and sentenced the accused to 12 years imprisonment plus 12 strokes of whipping. On appeal, the sentence was affirmed by the Judicial Commissioner.

G (b) In another case *Lim Kim Poh v. PP* [2000] 8 CLJ 328 where the accused also pleaded guilty to a charge of armed gang robbery under s. 395 and s. 397 of the Penal Code. Kang Hwee Gee J affirmed the sentence of six years imprisonment and five strokes of whipping imposed by the Sessions Court.

H (c) In the case of *PP v. Timothy Bilong & Anor* [2009] 1 LNS 1738, Zulkefli Bakar J sentenced the accused to five years imprisonment upon pleading guilty to a charge of armed robbery under s. 395 and s. 397 of the Penal Code.

I

[28] Having reviewed the facts and circumstances of this case and relevant authorities, I am in agreement with the learned Deputy that the sentence imposed by the trial judge is not in accord or suitable with the current trend. It is also manifestly inadequate. As such the sentence by the trial judge is set aside and in its place each respondent is sentenced to 12 years imprisonment from the date of arrest ie, 5 December 2011 and 12 strokes of whipping. Let it be known to the public at large that our court has viewed the street crimes of this nature very seriously.

[29] In the midst of finalising this judgment, I have come across a recent Criminal Appeal case of *Muhammad Ridoan & Anor v. PP* [2013] 5 CLJ 904; [2013] 1 AMR 566 involving an armed gang-robbery wherein at the lower court each appellant was sentenced to seven years imprisonment and seven strokes of rattan on a plea of guilty. On appeal the sentence against both appellants was enhanced to ten years imprisonment and ten strokes of rattan. In enhancing the sentence, the High Court Judge had this to say.

> [17] In my view the sentence in the present case is not deterrent enough and does not sufficiently reflect the degree of public abhorrence for this type of criminal behaviour. The offence is rampant, it is traumatising to the victims and is compounded in the present case by the fact that the perpetrators are aliens. They should be law abiding and earn their living honestly instead of breaking into other people's homes and robbing them of their belongings. I have at the hearing of the appeal given the appellants the opportunity to submit on why the sentence ought not to be enhanced. Both merely said that the sentence is adequate and that they are remorseful after thinking the matter over while serving jail sentence for the past two months. For reasons I have adumbrated earlier I am not persuaded that the sentence ought not to be enhanced. In the circumstances and in exercise of my powers of revision under s. 325 read with s. 316(b)(ii) of the Criminal Procedure Code, I order that the sentence against both appellants be enhanced to 10 years' imprisonment and 10 strokes of the rotan. Their appeal against sentence is struck out.

[30] There is quite a disparity of sentence in *Muhammad Safriadi*, *supra* where the sentence was 12 years of imprisonment and 12 strokes and *Muhammad Ridoan & Anor*, *supra* the sentence was ten years of imprisonment and ten strokes on one hand and on the other in *Lim Kim Poh*, *supra* where the sentence was six years imprisonment and five strokes and *Timothy Bilong & Anor*, *supra* the sentence was five years of imprisonment but no stroke. What are common in these four cases, they are cases of armed gang-robbery and all the accused pleaded guilty to the charges. To be fair to the first and second accused they were not armed at the time of committing the gang-robbery in this case. Nevertheless, according to the "victim's impact statement" (see s. 183A of the Criminal Procedure Code), besides financial losses (the gold necklace was beyond recovery as it had been melted), she was traumatised by the gang-robbery. After the incident, SP3 was too afraid to stay alone in her own house and always require a companion to be with her. Certainly this has cause inconvenient to SP3 and her family members.

[31] As regard to a proper sentence, we may take the que or indication in a plea bargaining situation which is provided in s. 172D(1)(c)(ii) of the Criminal Procedure Code. However take note that certain offences are not applicable: see s. 172D(3)(a)(b)(i), (ii) (iii), (iv), (v), and (4). The sentence in a plea bargaining case, it should "not be more than half of the maximum punishment of imprisonment provided under the law for the offence for which the accused has been convicted".

[32] In the instant case the maximum punishment under s. 395 of the Penal Code under which both the accused were charged was 20 years imprisonment. Assuming both the accused plead guilty to the charge herein, the maximum punishment imposable on the accused should not be more than ten years by reason of s. 172D(1)(c)(ii). Of course the sentence may be ten years or slightly less, but certainly it should not exceed ten years.

[33] However, reverting back to the present case, both the accused did not plead guilty to the charge. They claimed to be tried and the trial proceeded until the end of the whole case. It is axiomatic that it is not a plea bargaining case. It is logical that upon being found guilty, convicted after a full trial, the sentence should be more than the plea bargaining cases. In other words,

the sentence should be more than ten years imprisonment. Therefore, the sentence of five years imprisonment and three strokes imposed by the presiding judge is grossly inadequate. It is a dereliction of my duty, if I am to fold my arm, do nothing and let the sentence of the lower court pass by undisturb or untouch like a sacred cow. Justice demand that I ought to interfere to correct the injustice that has fallen on the victim, SP3 and the public outcry of this type of crime.

[34] Having said all that, despite there is no cross appeal by the Public Prosecutor, I set aside the sentence of five years imprisonment and three strokes. In its place, I substitute with the sentence of 12 years imprisonment with effect from today ie, 15 April 2013 and ten strokes of whipping on each accused.